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ABBL DEPOSITARY BANKING CLUSTER, LUXEMBOURG

GUIDELINES ON LOOK- THROUGH AND CONTROL



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Glossary

AIF	Alternative Investment Fund within the meaning of the AIFMD.
AIFM	Alternative Investment Fund Manager within the meaning of the AIFMD.
AIFMD	Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010.
AIFMD-CDR	Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.
Amended Directive on consolidated accounts	Seventh Council Directive 83/349/EEC of 13 June 1983 based on article 54(3)(g) of the Treaty on consolidated accounts as amended by the Financial Statements Directive.
CSSF	The Luxembourg financial sector supervisory authority, the <i>Commission de Surveillance du Secteur Financier</i> .
CSSF Circular 18/697	CSSF Circular 18/697 on organisational arrangements applicable to fund depositaries which are not subject to Part I of the Law of 17 December 2010 relating to undertakings for collective investment, and, where appropriate, to their branches and amending Circular CSSF 16/644 regarding the provisions applicable to credit institutions acting as UCITS depositary subject to Part I of the 2010 Law, where appropriate, represented by their management company, as well as Circular IML 91/75 (as amended by Circular CSSF 05/177) regarding the revision and remodelling of the rules to which Luxembourg undertakings governed by the Law of 30 March 1988 on undertakings for collective investment (“UCI”) are subject.
Depositary	Legal entity in charge of safekeeping and record keeping duties with regard to financial instruments and other assets.
ESMA	European Securities and Markets Authority.
ESMA Q&A on AIFMD	ESMA Questions and Answers on the application of the AIFMD (ESMA34-32-352) (last updated on 4 October 2018).
Financial Statements Directive	Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial accounts, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.
Luxembourg AIFM Law	Luxembourg law of 12 July 2013 on alternative investment fund managers (as amended).
SPV	Special Purpose Vehicle.

Introduction and scope of guidelines

Under the overarching aim of enhancing investor protection, the Alternative Investment Fund Managers Directive (AIFMD) has introduced a stringent regulatory environment for the alternative fund industry and has established the depositary as one of the main pillars of investor protection.

With the Alternative Investment Fund Manager (AIFM) having to ensure that a single depositary is duly appointed for each authorised Alternative Investment Fund (AIF) it manages, the depositary has to comply with a set of requirements and is obliged to execute safekeeping duties not only for traditional custodial assets but also for other assets which include non-custodial assets (e.g. private equity, real estate, infrastructure, and over-the-counter derivatives). Those safekeeping obligations also cover investments by an AIF through intermediaries and for which a look-through approach should in principle be taken, i.e. target investments held by an underlying structure controlled directly or indirectly by an AIF.

Such look-through principle considerably complicates the safekeeping of custodial and non-custodial assets and is a widely discussed and controversial topic in the market.

Based on this initial assessment and in light of market practices in Luxembourg when it comes to the application of the look-through principle in different control situations, the present ABBL Guidelines aim at providing, in the first part, an overview of the various control situations that depositaries may encounter in their day-to-day business, while focusing, in the second part, on the ensuing consequences when applying the look-through principle anchored in the AIFMD framework. Finally, the annexes and appendices provided as part of these Guidelines present the practical application of the principles discussed in the Guidelines along with a model recommendation on how to structure the look-through assessment, as well as a basic list of information that should be provided by the AIF (or the AIFM acting on behalf of the AIF) for the depositary to be able to conduct its assessment.

The look-through principle dealt with in these Guidelines refers to the look-through controls that a depositary is or is not required to conduct in the context of its safekeeping duties, including ownership verification and record-keeping. As such, it needs to be differentiated from look-through controls that are conducted as part of the depositary's investment compliance process, which is not dealt with in the present Guidelines.

It is critical for the depositary teams to avoid spending resources on a control test immediately when the type of asset/entity beneath the fund is unclear.

This asset/entity could either be an intermediate entity, legally referred to as "financial or legal structure" controlled directly/indirectly by the fund or the fund manager, or it could be a target asset, legally referred to as an "underlying asset", from which the fund expects to gain exposure and generate income for its investors.

The CSSF frequently reminds depositaries that the law mandates a clear line of sight over the assets targeted by the AIF's investment policy. When these target assets are held through entities controlled directly/indirectly between the fund and the target assets, the depositary must perform its safekeeping duties on a look-through basis, i.e. through the intermediate controlled entity.

Therefore, before rushing into a control test, it is essential for the depositary team to conduct thorough scrutiny of the fund's investment policy and, wherever possible, perform an **"asset identification test"** prior to any **"control test"**. Indeed, it is important to note that the "target identification test" should not be confused with the "intermediate entity control test". The latter only comes into play once the asset identification test is done, and the result indicates that the asset/entity beneath the fund is not a target asset.

The asset identification test is essentially a preliminary step that can only conclude with one of two results:

- (i) The intermediate entity is deemed a "target asset", in due compliance with the investment policy and the risk disclosure of the fund, in which case no look-through applies.
- (ii) The intermediate entity is not a target asset as per the investment policy and the risk disclosure of the fund, in which case the control test must be implemented. If following the control test, control is evidenced, it indicates that look-through applies in line with the fund's investment strategy. However, if the control test is negative, the depositary has then identified an inconsistency with the fund's investment strategy, which likely constitutes a breach of the investment policy. The depositary must then report this anomaly ex-post as part of its "oversight duties" pursuant to article 19(9) of the AIFM Law.

It is also worth noticing that this asset identification test based on the investment policy cannot differ from the nature of the target assets by all core AIFM processes (investment restrictions, asset valuation, risk management, portfolio management, ESG compliance) as described in the relevant sections of the fund documents. Furthermore, it is paramount that this investment policy is effectively implemented and performed by the AIFM during the lifetime of the fund's investments. In other words, the investment policy and such core processes must consider the same target/underlying assets.

I. Definition and determination of situation of control

Assessing whether a client has control over an underlying structure (e.g. participations in SPVs, holding of financial instruments and/or other types of assets, etc.) in the course of the look-through process for an AIF is an important task for the depositary in respect of its duties and liability questions. Based on the look-through process (i.e. process that requires the identification of the complete underlying structure of a client), the responsibility for the performance of the safekeeping duties in respect of the underlying assets of a client (AIF or AIFM acting on behalf of the AIF) lies with the depositary of the AIF having control over an underlying structure.

Unfortunately, the application of the look-through principle is not a straightforward process. The AIFMD provides a set of general rules for the identification of the target investment, but the application of those general rules is often subjective, especially with regard to the notion of control.

Hence it is useful and necessary to step back from the general rules in order to have a look at the underlying legal background and principles which apply in control scenarios (I.1). Based on this first step to understand what ‘control’ means from a legal perspective, the notion of control as part of the look-through process becomes clearer (I.2) and it will be possible to extrapolate the applicable criteria based on the type of control identified (I.3). Against this extrapolation, it will be possible to elaborate a model decision tree ([Annex 1](#)) pursuant to which members will be able to assess different situations which include control and no-control scenarios. Finally, the Guidelines also include a classification of criteria applicable to controlled structures, based on which simpler situations of control can be benchmarked against less clearer situations which would be subject to the depositary’s own risk-based assessment (I.4).

I.1 Legal background and principles – Look-Through

In line with the requirements set out in the AIFMD, depositaries are under a responsibility to ensure the safekeeping of all assets of an AIF. These safekeeping duties of the depositaries cover as such target investments of an AIF, regardless of whether they are held through intermediate legal or financial structures.

Indeed, articles 89(3) and 90(5) of the AIFMD-CDR specify in this respect that the depositaries’ safekeeping obligations apply on a look-through basis to the underlying assets held by financial or legal structures controlled directly or indirectly by the AIF or the AIFM acting on behalf of the AIF.

In the end, whether a depositary is required to look-through until the underlying assets of an AIF client depends on whether or not the AIF client, or its AIFM on behalf of the AIF, controls the intermediate financial or legal structures holding the underlying assets.

I.2 Definition criteria

As a general guidance and market practice, it is possible to consider that if the two control environments set out under (a) and (b) below arise within a client's structure, the principle should be to consider that there is a controlled structure. In all other cases, the analysis will be more nuanced and requires the depositary, in collaboration with the relevant AIF (or AIFM, as the case may be) to apply a risk-based approach when determining whether or not a specific structure includes a controlled structure.

The depositary shall also consider various elements beyond the concept of control derived from the accounting consolidation tests and shall particularly review the investment policy of the AIF to understand what are the underlying assets that are being proposed to end-investors. It will help the depositary identify the target asset to which its safekeeping duties have to be undertaken. Likewise, the instruments of incorporation of each financial or legal structure as part of the controlled structure (e.g. Articles of Association) should be analysed on a on a per transaction basis to assess whether the control is procured, in particular, by way of direct shareholding, voting rights or ability to exercise a dominant influence.

Finally, and in addition to the criteria defined throughout these Guidelines, when a potential control situation remains unclear, it is furthermore possible to identify certain overarching criteria which enable depositaries to develop certain clearly established scenarios where control does necessarily exist. These scenarios will nevertheless depend on each depositary and the risk-based approach it applies. For some depositaries, control criteria may be interpreted more tightly, while other depositaries, in light of their own consideration, are willing to have a more permissive interpretation.

I.2.a Exclusive control

a. *de jure* control:

- i. The AIF (or AIFM on behalf of the AIF) holds the majority of voting rights (or, alternatively, the conferring control rights) either directly or through a shareholder agreement.
- ii. The AIF (or AIFM on behalf of the AIF) holds the right to appoint or remove the majority of the members of the management bodies of the underlying structure.
- iii. The AIF (or AIFM on behalf of the AIF) holds the right to exercise a dominant influence (as per contractual arrangements).

b. *de facto* control:

The AIF (or the AIFM on behalf of the AIF) holds less than 50% voting rights (or, alternatively, the conferring control rights), but there is no other shareholder in the structure with more voting rights (or, alternatively, the conferring control rights), and it can be demonstrated that the AIF (or the AIFM on behalf of the AIF) exercises a dominant influence.

There are further no public shareholder agreements in place. The investment chart (which provides for the voting rights) that the AIF needs to provide as per CSSF Circular 18/697 (points 105 and 110) is an appropriate starting point for verifying *de facto* control situations.

I.2.b Joint control (whether via arrangement or co-ownership agreement)

The AIF (or the AIFM on behalf of the AIF) has contractually agreed sharing the control with a third-party investor (e.g. via joint venture or joint operation). The joint control takes place, however, only when decisions on the relevant activities require unanimous consent of the parties sharing control.

This is typically the case in structures with a limited number of shareholders, who, by themselves, do not have exclusive control. Depositaries should, in these situations, pay particular attention to custodial assets and their safekeeping. It is important for depositaries to fully understand the way these custodial assets have to be safekept.

I.2.c Risk-based approach

For cases involving exclusive control and/or dominant influence scenarios, the depositary is required to apply look-through.

In all other cases with less clear-cut scenarios, the depositary will need to determine whether or not to apply look-through in light of the risk-based approach it applies. As such, the risk-based approach comes into play (typically in cases of significant influence)¹. In those instances, the depositary, at its own discretion based on its professional judgement and in light of the specific factual elements at hand, will decide whether or not to proceed with look-through.

The depositary should, as part of this determination process, also consult the AIF (or the AIFM on behalf of the AIF) to get its view on the control situation.

When expected to apply “professional judgement”, the depositary may have a “*substance over form*” approach, and take into consideration the following:

- How is the AIFM conducting its duties (in particular risk management, valuation and compliance)?
- Which counterparties are involved in the underlying assets administration/management and how are these counterparties onboarding these assets and monitoring their ownership?
- What is the proportion represented by the target assets in the overall AUM of the AIF?

During the depositary analysis, none of the aforementioned criteria are to be regarded as isolated items. The depositary should consider a combined approach before drawing its conclusions.

¹ Typical scenarios in which the depositary should rely on its risk-based approach are cases where the AIF (or the AIFM acting on behalf of the AIF) is participating in the financial and operating policy decisions (without administering the policies). Other “control” indicators (such as special relationships between the AIF/AIFM and the underlying entities) may also be considered by the depositary in its risk-based assessment.

I.3 Level of control assessment

For AIF structures in particular, the depositary needs to determine until which level of the structure and to what extent it should conduct its assessment to identify control.

As a matter of prudent approach and in the absence of any final official guidance in this regard, when the investment strategies of the sub-funds are similar and/or the portfolio managers are identical, the depositary may want to consider the AIF as a whole, referring to the umbrella level of the AIF in case it has sub-funds. The depositary should, *ab initio*, not restrict its control assessment to the sub-fund level of the AIF.

The depositary should also pay particular attention to common management situations, like cross directorship within entities part of the same investment structure, appointment of a common investment manager, or shareholder agreement that would define investment decisions' powers.

Depending on the circumstances (*please refer to the test cases*), these situations could give direct or indirect control to the fund and trigger safekeeping obligations on a look-through basis for the depositary.

As the concept of common management is not expressly referred to in the fund regulations nor further elaborated, its consideration in the overall approach of control assessment fully remains a matter of professional judgement, based on the documentation provided by the client, and which may therefore vary from one depositary to another in the absence of clear regulatory guidance. Test cases referring to such concept are provided for illustrative purpose only.

As indicated before, this analysis shall be combined with the review of the investment strategy, together with the investment decision documents (as per article 105 of the CSSF Circular 18/697, "the decision of the AIF or the IFM acting on behalf of the AIF to process the acquisition/sale of the asset(s) concerned") to ensure alignment with regard to the identified target asset.

I.4 Notion of control

The concept of control, as referred to in the AIFMD, derives from the more generic notion set out in the accounting consolidation tests. Indeed, article 1 of the Amended Directive on Consolidated Accounts initially defined the concept of control on the basis of accounting consolidation tests which take into account the following elements to assess control situations:

- Direct control (i.e. an undertaking is the sole shareholder of another undertaking), or
- Voting control (i.e. an undertaking has a majority of the shareholders' or members' voting rights in another undertaking), or
- The right to exercise dominant influence over the underlying undertaking (i.e. an undertaking has the right to exercise a dominant influence over an undertaking of which it is a shareholder or member, pursuant to a contract entered into with that undertaking or to a provision in its memorandum or articles of association), or
- The right to appoint/remove a majority of members of the administrative or supervisory body of the underlying undertaking (i.e. an undertaking has the right to appoint or remove

a majority of the members of the administrative, management or supervisory body of another undertaking and is at the same time a shareholder in or member of that undertaking).

It is worth noting that depositary banks may not always be in a position to receive the full set of information², which enables them, *ab initio*, to conclusively assess control situations. While they should put themselves in the best position to receive all required documentation, information, and confirmations from their counterparty, depositary banks may encounter practical situations where they will lack the full control picture at the beginning of the relationship. In that case, the depositary banks should continue gathering the required information and proceed on a step-by-step basis, conducting the control assessments regularly upon receiving new information and documentation.

These initial account consolidation tests considerations for assessing control situations are further complemented by the provisions of article 22(1) of the Financial Statements Directive, which specifies that, with regard to the requirement to prepare consolidated financial statements, a controlling interest may be substantiated where an undertaking (AIF or the AIFM acting on behalf of the AIF) is a shareholder in or a member of an undertaking:

- Having a majority of the members of the administrative, management or supervisory bodies of that undertaking (a subsidiary undertaking) appointed solely as a result of the exercise of its voting rights; or
- Having a control on a majority of shareholders' or members' voting rights in that undertaking.

Based thereon, it is clear that control can be direct or indirect and exercised by the AIF or AIFM on behalf of the AIF.

1.5 How to determine control

The CSSF has provided in its FAQ document on the AIFMD that “the definition of a controlled entity is a matter of professional judgement and will depend on the specific structure in question. The AIF or the AIFM should provide the depositary with all the required information to confirm whether the underlying entity is directly or indirectly controlled, or not”³. While the professional judgement will certainly, at least slightly, differ from one depositary to another, it is generally accepted that the notion of professional judgement refers, initially, to the “prudent-person principle” as well as the “risk-based approach”. In light thereof, the underlying concept of professional judgement is such that the depositary should, on an independent basis and in the interests of the investors, proceed with its assessment to decide together with the AIF or the AIFM whether or not control exists.

² The AIF or the AIFM acting on behalf of the AIF is ultimately responsible for providing the information.

³ CSSF FAQ (version 12, 14 August 2018) concerning the Luxembourg AIF Law as well as the AIFMD-CDR with regard to exemptions, general operating conditions, depositaries, leverage transparency and supervision, Q. 10.g) (*How should the look-through be performed*). Cf. also the requirements set out in this respect in CSSF Circular 18/697, including in particular para. 153.

Based on this initial statement, it is possible to distil a few elements which will enable depositaries to determine control. The model decision tree set out in [Annex 1](#) hereafter will serve as a basis for depositaries to proceed with their control assessment and its resulting consequences.

As an initial step to assess a control situation, the depositary should enter into contact with its client (whether that is the AIF or the AIFM acting on behalf of the AIF) to request evidence, based on the accounting consolidation tests set out in the Financial Statements Directive, on structures for which control issues may arise. The evidence should focus on possible ways by which control may be exercised. For instance, instruments issued by intermediary vehicles established by the AIF, or by the AIFM on behalf of the AIF cannot be considered as a target asset of the AIF. As an additional (not exclusive) layer of information, depositaries may resort to the AIF-specific information, required to be provided by AIFs, in light of article 24 of the AIFMD, to their relevant supervisory authority (e.g. the CSSF for Luxembourg-supervised AIFs)⁴.

Based on this foundational evidence, the depositary, in the course of the client onboarding phase, should continue its assessment on whether its client's underlying entity(ies) is/are directly or indirectly controlled by it. This assessment should be performed on an ongoing basis, for example, when performing the yearly ownership verification.

The main assessment criteria for a control situation will be through ownership or majority voting power assessments. Where an AIF is the majority shareholder of an underlying structure, it is very likely that the AIF will have control, and a depositary will be in a position to assume that control exists. While the AIF or the AIFM acting on its behalf may exceptionally prove otherwise, depositaries should, as a matter of principle, initially assume control in such ownership situations. Any deviation from this assumed principle should be treated as an exception which needs to be identified on a case-by-case basis. Depositaries should further note that, when dealing with parallel fund structures (with true joint control situations being excluded), only one of the co-investing funds can have control (for further information on parallel fund structures, please refer to Scenario 6 attached as Appendix to the present Guidelines). Also, the nature of financial relationships between the AIF and the underlying vehicles should be considered as potential elements of indirect control. In fact, in case where the investment funding is executed by way of intercompany loans or equity-like instruments down to the target assets, this may typically result in financial relationships between the AIF and the underlying vehicles which may be akin to an equity shareholding relationship.

As mentioned, it is possible for the AIF or its AIFM to disagree with the assumptions/assessment of the depositary of such control situations. In case such a disagreement between the client and the depositary arises, the depositary is further required to set up appropriate escalation processes to ensure that the right information, documentation and evidence is circulated with a view to solving such disagreement. These escalation procedures should be set up and defined during the onboarding process.

⁴ In these standardised reports, AIFs are, *inter alia*, required to provide information on dominant influences in their structure and set-up.

To summarise, **the below criteria should be collectively assessed to determine the applicability of the look-through:**

- “Substance over form” principle;
- Direct and indirect control elements (investment decision-making process, parallel structure, etc);
- Multi-criteria approach:
 - Controls derived from accounting consolidation tests,
 - Investment strategy of the AIF,
 - Articles of association of the entities through which the target investments are held,
 - Existence of a common management entity (or general partner) between the AIF and such entities,
 - Potential voting and veto right granted to the minority shareholder entities within the structure,
 - Identification of vehicles set up by AIF management vs vehicles part of the target,
 - Proportion represented by the target assets in the total assets of the AIF,
 - Assets targeted by AIFM processes: asset valuation policies, investment restrictions, risk management, investment due diligence documentation and documents used by the AIFM to control its ownership,
 - Nature of the financial relationships between the AIF and the underlying vehicles.

I.6 Nature of the safekeeping duties to be applied on a look-through basis

The following safekeeping duties are of relevance and to be applied on a look-through basis in respect of the underlying assets:

- Safekeeping duties for custodial assets, and
- Safekeeping duties for “other assets”.

It is, however, worth noting that, depending on the complexity of a particular ownership chain for relevant AIFs, depositaries may use different means (paper-based or digital) to record-keep and produce the inventory.

Finally, CSSF Circular 18/697 (point 130) provides that the depositary is granted an inspection right in regard to tangible assets owned by the AIF. This inspection right needs to be ensured even where the relevant tangible assets are held through a chain of controlled financial/legal structures.

II. Look-through and control issues

After identifying the elements and criteria based on which control can be identified for the purpose of applying the look-through provisions, the second part of these Guidelines is dedicated to the operational and practical aspects of the entire process, with a particular focus on the frequency at which control should be assessed (II.1), as well as potential derogations from the requirements (II.2).

II.1 Control framework

This section starts off with the particularities that arise in the safekeeping duties for depositaries in look-through scenarios when it comes to assets that are not financial instruments (II.1.a), situations in which the depositary can and should rely on the AIF (or the AIFM acting on behalf of the AIF) (II.1.b), as well as the applicable monitoring frequency (II.1.c).

II.1.a Ownership verifications in look-through scenarios - Reliance

The depositary of an AIF client may experience difficulties in performing its ownership verification duties for “other assets” of the AIF, given that the depositary neither physically holds nor has direct access to an AIF’s “other assets” and/or holdings in financial or legal structures, fund vehicles or other controlled legal or financial structures. These difficulties are further increased to the extent that, in these cases, the depositary typically does not have a direct contractual relationship with the underlying financial or legal structure.

In these circumstances, the depositary is required to rely on its client (the AIF or the AIFM acting on behalf of the AIF) to ensure that the necessary information and documentation is provided to it (cf. Point 153 of CSSF Circular 18/697).

In case the documentation provided is unsatisfactory to the depositary and if no agreement can be found with the client, the depositary should initiate the escalation procedure to the AIF (or the AIFM acting on behalf of the AIF) set up and agreed to with the AIF (or the AIFM acting on the AIF’s behalf). The escalation procedures with the AIF (and/or the AIFM acting on behalf of the AIF) aim at guaranteeing a continuous information flow and securing the fulfilment of the depositary’s duties⁵.

The legal provisions in the AIFMD further provide the prerequisite legal framework which enables the depositary to fulfil its duties. As such, article 90(1) of the AIFMD-CDR provides that the AIFM needs to provide its depositary, upon the start of its duties and on an ongoing basis, with all relevant information the depositary needs in order to comply with its obligations. The article goes on to clarify that the AIFM also needs to ensure that the depositary is provided with all relevant information by third parties (including, as per CSSF Circular 18/697, at least a detailed structure chart of the investment).

⁵ Cf. in relation to the escalation procedure paras. 69 – 72 of CSSF Circular 18/697.

Article 90(3) of the AIFMD-CDR further specifies that the AIFM has to ensure that all instructions and relevant information in relation to the AIF's assets are sent to the depositary, so that the depositary is in a position to perform its own verification and/or reconciliation procedure. In this respect, the depositary needs to ensure that the AIFM actually has and implements appropriate procedures to verify that any acquired assets are appropriately registered in the name of the AIF, or in the name of the AIFM on behalf of the AIF. The AIFM should also have in place appropriate procedures based on which the AIFM can check the consistency between the actual positions in the AIFM against the depositary records.

On the depositary's end, it is required to put in place procedures that ensure that the depositary has received all necessary documentation and information to fulfil its obligations.

II.1.b Monitoring start and frequency

(1) On-boarding phase

Before accepting a new mandate for an AIF client, the depositary should put itself in a position where it has a proper understanding of the client's investment strategy. This exercise will allow the depositary to also develop a clear understanding of the different types of assets that the client will acquire over time according to the investment policy, as well as the liquidity flows to be anticipated at the time of purchase or sale.

To ensure this level of understanding, the depositary should require the client's AIFM to provide a reasonable analysis, including associated evidence, in relation to the investment strategy of the client. The depositary should, after consideration of this analysis and other independent checks, be in a position to assess the final investments as well as the client's structure.

It is strongly recommended in this case to include adequate legal wording in the depositary agreement between the client and the depositary and/or the service level agreement to be signed with the AIFM. This will ensure that the depositary has access to all the information it requires to perform the ownership verifications, as per paras. 151 to 155 of CSSF Circular 18/697.

Based thereon and in light of the client type, the depositary should be specific about the type of documentation required for the various types of assets⁶. As such, a detailed list of documentation by asset type and specific for each layer of the investment chain (as part of the look-through principle, therefore including information required under the look-through approach) needs to be included in the written procedures drawn up between the depositary and the AIF or the AIFM acting on behalf of the AIF. This should, as a matter of good practice, be further corroborated by way of contractual arrangement between the counterparties (e.g. in a service level agreement or operating memorandum).

⁶ Cf. in particular paras. 114 – 117 for investments in real estate, paras. 118 – 120 for investments in target funds, paras. 121 – 123 for investments in issuers and unlisted companies, paras. 124-126 for intangible assets, para. 127 for investments in derivatives, and paras. 128 – 136 for investments in tangible assets.

(2) On-boarding specific types of funds

Depositories should, however, pay specific attention to certain types of fund clients, namely real estate (RE), private equity (PE), as well as infrastructure investment funds.

These three types of investment funds are known for their complex setups often including several layers of financial and legal structures and holding structures. This is of particular relevance since the requirement to perform their duties on a look-through basis will apply more frequently in this type of setup.

As a general guideline, depositories need, at least, to perform the following steps with regard to the AIF or the AIFM acting on behalf of the AIF and the client thereof:

- Performance of a look-through review where the AIF has a direct and/or indirect controlling interest in the assets held by a financial or legal structure;
- Request for prompt information by the AIF or the AIFM acting on behalf of the AIF in case they become aware that the AIF has or will have direct or indirect control in an underlying structure;
- Performance of a look-through review of the entire underlying chain of financial or legal structures. The depository should go as far down the chain of control as necessary. The depository should either look-through until the end-investment or until a reasonable level of control in the underlying structure (depending on the risk-based approach adopted by each depository). For PE and infrastructure funds, depositories should identify the assets to which they should look-through. In light of the depository's assessment (made on criteria such as the investment policies, articles of association of the target investments, availability of audited financial statements for the target investment), intermediate structures which are not established by the AIF or the AIFM for the purpose of investing in the underlying asset or similar and the company operating the PE/infrastructure project, may be considered as the target asset. In such a case, an Operating Company can be defined as a company which usually manages or operates target investments at its own discretion (i.e. without receiving direct instructions from the Fund or its portfolio manager). It contrasts with a Holding Company, whose main function is to own other companies or assets. An Operating Company usually issues Consolidated Annual Audited Accounts as opposed to a Holding Company. Accordingly, look-through is not always applicable all the way down to the particular PE/infrastructure project. When Audited Consolidated Annual Accounts are produced by a PE/Infrastructure Operating Company, and depending on the information disclosed in these annual accounts on the underlying assets, the depository might stop its look-through at this level;
- Review of the documentation provided by the AIF or AIFM acting on behalf of the AIF during the ownership verification process as well as the ongoing record-keeping exercise; and
- Understanding in which manner the economic benefits of transactions/ownership (acquisitions, disposals, and repatriation of income) reach the AIF's investors.

(3) New investments

Based on the foregoing provisions of the AIFMD and the AIFMD-CDR, the AIF and/or the AIFM acting on behalf of the AIF is required to assist the depositary in identifying and understanding the investment structure of the fund. For such purpose, the AIF or the AIFM acting on behalf of the AIF needs to clarify how a particular investment is intended to operate, in particular whether the end-investment of the fund is a participation in a target company or an interest in tangible assets via equity or debt participations.

On top of this preliminary information, the depositary should be provided with additional information that would evidence control for each layer of the underlying structure and the target investment from the AIF or the AIFM acting on behalf of the AIF.

Based on this information, the depositary will perform its own control analysis of the client's investment structure.

Finally, the depositary may also analyse, to the extent available or made available by the AIF/AIFM, the information that the AIF or the AIFM acting on behalf of the AIF has filed with the CSSF for purposes of its reporting obligations under articles 24 and 25 of the Luxembourg AIF Law. Indeed, the AIF or the AIFM acting on behalf of the AIF is required to provide the CSSF with a certain set of information in case the AIF controls directly or indirectly another non-listed company⁷.

On the basis of a review of the various information and documentation received during the above requests, the depositary will finally proceed with its ownership verification and record-keeping exercises.

In case the information and/or documentation provided or made available by the AIF/AIFM does not meet the depositary's quality standards or is not provided and/or not available at all, the depositary will rely on the escalation procedures drawn up at the inception of the relationship with the AIF/AIFM.

(4) Change of control scenarios

The AIF or the AIFM acting on behalf of the AIF is further required to inform and confirm to the depositary any change in the control structure (acquisition or disposal), as per article 25 of the Luxembourg AIF Law. Where the AIF or the AIFM acting on behalf of the AIF refuses to inform or confirm the depositary changes in the control structure, the depositary will rely on the escalation procedures drawn up at the inception of the relationship with the AIF/AIFM.

Based on this confirmation, the depositary will proceed with its own control analysis, by reviewing the confirmation (documentation and/or information) and verifying, to the extent relevant, the ownership. Finally, the depositary will also proceed with an update of his records.

⁷ This reporting requirement does not apply to an SPV setup for RE acquisitions or small and medium-sized enterprises within the meaning of article 2(1) of the Annex to the Commission Recommendation 2003/361/EC of 6 May 2003 on the definition of micro, small and medium-sized enterprises.

II.2 Derogations

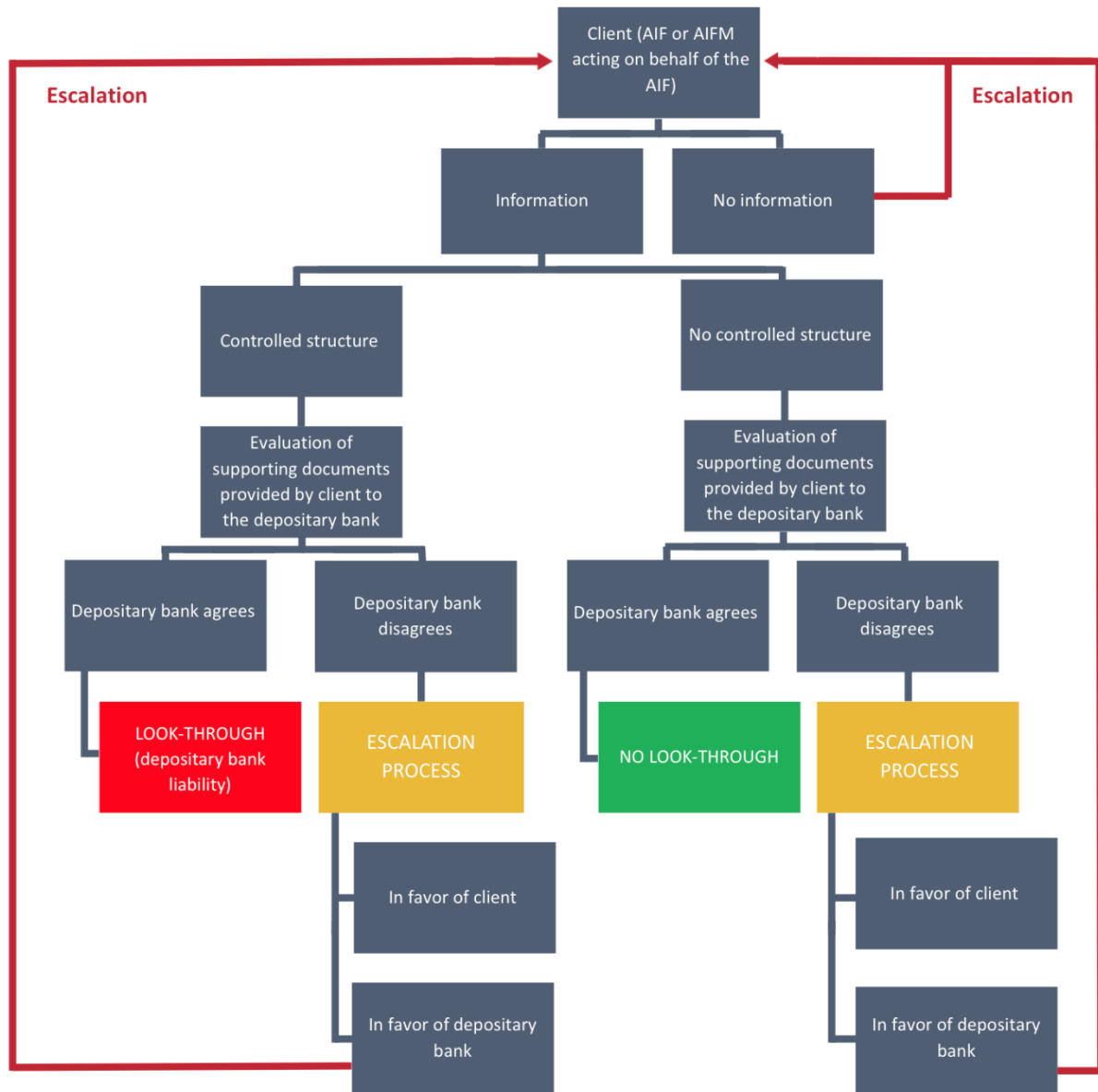
Article 90(5), second subparagraph, and article 89(3) of the AIFMD-CDR provides for an exemption to the look-through requirement for fund of funds structures and master-feeder structures, to the extent the underlying funds have a depositary which provides safekeeping functions for these funds' assets. By extension, the wording set out in article 90(5), second subparagraph of the AIFMD-CDR also disapplies the look-through requirements where an AIF invests in structures, to the extent these structures/vehicles qualifying as AIF⁸/UCITS have appointed a depositary with similar safekeeping duties and obligations⁹.

⁸ Notwithstanding the foregoing, please remember that article 36 (1) of AIFMD provides that an EU AIFM that markets to professional investors, in their territory only, units or shares of an EU feeder AIF whose master AIF is not an EU AIF managed by an authorised EU AIFM, is deemed to ensure that one or more entities are duly appointed by the master AIF to carry out the depositary safekeeping duties on its assets ("depositary lite").

⁹ According to articles 89(3) and 90(5) of the AIFMD-CDR, the look-through requirement does not apply to fund of funds structures or master-feeder structures where the underlying funds have a depositary which provides custody and ownership verification as well as record-keeping functions in regard to the fund's assets. If the underlying structure has no depositary, the notion of control will need to be assessed to determine whether look-through applies.

ANNEX 1

Escalation decision tree



ANNEX 2

Information to be received from the AIFM to determine whether look-through applies

The depositary should request the following information from the AIF (or AIFM acting on behalf of the AIF), to assess whether or not look-through applies and thereby whether to proceed with the look-through verifications.

The below table provides an indicative overview of the information that the AIF (or AIFM acting on behalf of the AIF) should provide to the depositary as part of the onboarding process.

Depositaries are encouraged to regularly cross-check the below information to ensure that the information is up-to-date at all times and to assess, on a regular basis, whether look-through applies or not.

General information on the fund	Name of the AIF
	Name of any sub-funds
	Registered address of the AIF
	Country of incorporation of the AIF
	Registration ID of the AIF (e.g. commercial register ID)
	Legal form of AIF
	External auditor of AIF
General information on the fund manager	Accounting year-end of AIF
	Name of the AIFM
	Registered address of the AIFM
	Country of incorporation of the AIFM
	Registration ID of the AIFM (e.g. commercial register ID)
Investment structure	Legal form of AIFM
	Structure chart, including ownership percentages and voting rights
Information on the decision-taker	Confirmation for asset/investment if any other entity in the structure has a higher ownership percentage or more voting rights than the AIF
	Evidence on who is the decision-taker of the investment(s) of the AIF
Information on the main bodies of the investment structure	Where relevant, confirmation on the composition of the respective administration, management and/or supervisory bodies for each layer entity in the investment structure
Support information	Where relevant, latest annual report of the AIF
	Where relevant, articles of association for each layer entity in the investment structure

The above information will, in most scenarios, be sufficient for the depositary to decide whether look-through should apply. In those scenarios where no legal obligation for look-through applies (i.e. significant influence through indirect control), but in which the above information is not sufficient to finally decide on the look-through, the depositary may, based on its risk-based approach, decide to further request information in relation to the following to help in finalising the look-through assessment:

<i>Personal Relationships</i>	Confirmation of relationships with relevant key people at the level of the AIF/AIFM (e.g. common directorships, key people employed by the parent company)
<i>Financial relationships</i>	Confirmation of significant financial dependencies vis-à-vis the parent company: <ul style="list-style-type: none"> • Financing (debt contributions, guarantees and securities taken/granted over assets) • Technology • Procurement • Patent/asset control • Parent being the sole client

Ownership scenarios

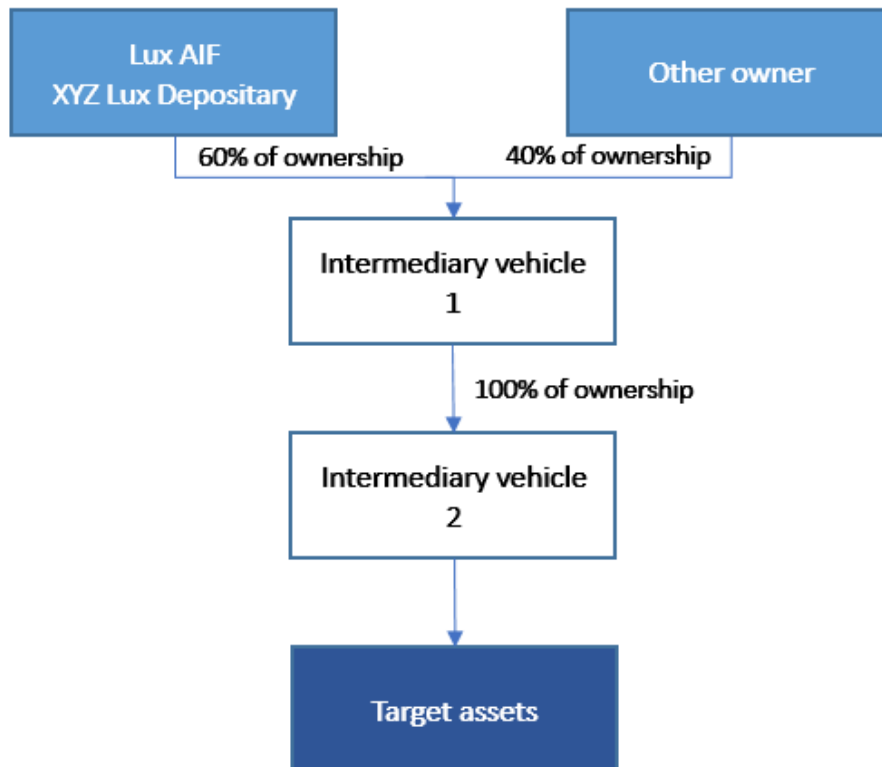
The information set out in the following ownership scenarios is:

- of a general nature only and is not intended to address the specific circumstances of any particular individual or entity,
- not necessarily comprehensive, complete, accurate or up to date,
- purely hypothetical and not to be regarded as all-encompassing, or re-creating real-life situations or structures, and
- not professional or legal advice (if you need specific advice, you should always consult a suitably qualified professional).

Please use the information set out in the appendices with the required professional diligence in order to avoid circumvention of the requirements of Directive 2011/61/EU.

01 —

SCENARIO 1: Ownership > 50%



FACTUAL CONSIDERATIONS

- XYZ Lux is the depositary of the Lux AIF.
- The Lux AIF controls the Intermediary vehicle 1 (e.g. 60% ownership)¹⁰.
- The term “other owner” refers to any type of owner with or without a depositary.
- The Intermediary vehicle 1 is controlling the Intermediary vehicle 2 (100% ownership).

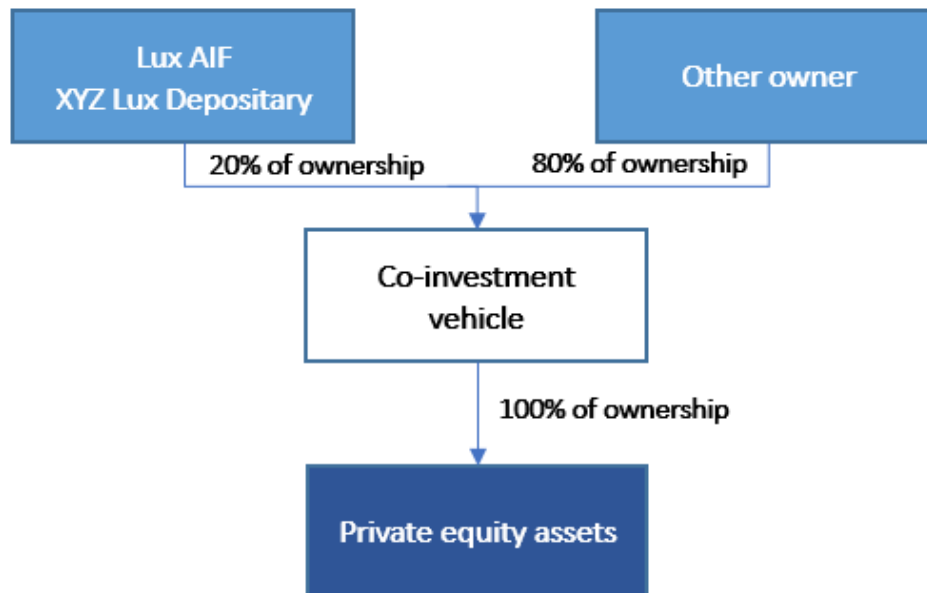
SUGGESTED APPROACH

- Look-through applies and safekeeping duties are performed to the level of the Target assets (based on articles 89(3) and 90(5) of AIFMD-CDR).

¹⁰ This model assumes that the full assessment of control was performed by the depositary, and it is established that control exists.

02 —

SCENARIO 2: Ownership < 50%



FACTUAL CONSIDERATIONS

- XYZ Lux is the depositary of the Lux AIF.
- The Lux AIF does not control the co-investment vehicle ¹¹ (e.g. 20% ownership, no voting rights, etc.).
- The investment strategy of the Lux AIF is to hold minority participations in private equity co-investment vehicles.
- The term “other owner” refers to any type of owner with or without depositary, and not part of the same Group as the Lux AIF (no common management).
- The Co-Investment Vehicle is controlling the private equity assets (100% ownership).

SUGGESTED APPROACH

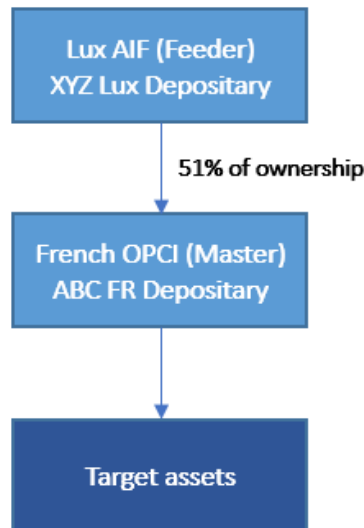
- Look-through does not apply and safekeeping duties are performed to the level of the Co-Investment Vehicle (based on articles 89(3) and 90(5) of AIFMD-CDR).

¹¹ This model assumes that the full assessment of control was performed by the depositary, and it was established that no control exists.

General note If the investment policy doesn’t clearly indicate minority holdings in co-investment vehicles/SPV (with the relevant risk disclosures) as target investments of the Lux AIF, look-through will have to be performed to the Private equity assets.

03

SCENARIO 3: Ownership > 50% with underlying regulated structure (having a depositary bank)



FACTUAL CONSIDERATIONS

- The investment strategy of the Lux AIF (Feeder) is to invest at least 85% of its total assets into the French OPCI (Master).
- XYZ Lux is the depositary of the Lux AIF.
- The Master Fund is a regulated AIF which has a depositary (ABC FR Depositary).

SUGGESTED APPROACH

- Look-through is subject to an exemption (not applicable), and the controls should stop at the level of the Master Fund (based on articles 89(3) and 90(5) of the AIFMD-CDR). Safekeeping duties should also be restricted to the level of the Master Fund.

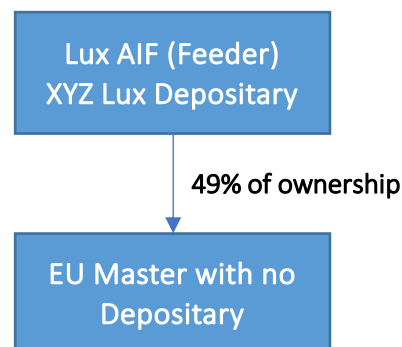
N.B.:

According to articles 89(3) and 90(5) of the AIFMD-CDR, the look-through requirements do not apply to fund of funds structures or master-feeder structures where the underlying funds have a depositary which provides custody and ownership verification as well as record-keeping functions in regard to the fund's assets. If the underlying structure has no depositary, the notion of control will need to be assessed with a view to determining if look-through applies.

General note If the investment policy doesn't clearly indicate the master and/or other fund of funds as target investments of the Lux AIF, look-through will have to be performed on the target assets. An information sharing agreement should be put in place between the depositary of the Lux AIF and the depositaries of such master/fund of funds in order for the depositary of the Lux AIF to have access to such information.

04

SCENARIO 4: Ownership < 50% (master/feeder)



FACTUAL CONSIDERATIONS

- XYZ Lux is the depositary of the Lux AIF.
- The Lux AIF (Feeder) has a minority holding in the EU Master Fund with no control¹².
- The Lux AIF (Feeder) is not marketed to EU investors.
- The Master Fund is an EU fund without a depositary.
- The AIFM is located in Luxembourg (or any other EU Member State).
- The investment strategy of the Feeder is to invest at least 85% of its assets into the Master. Worth noting that the investment strategy of the Master is also described in the Feeder's PPM for transparency purposes.

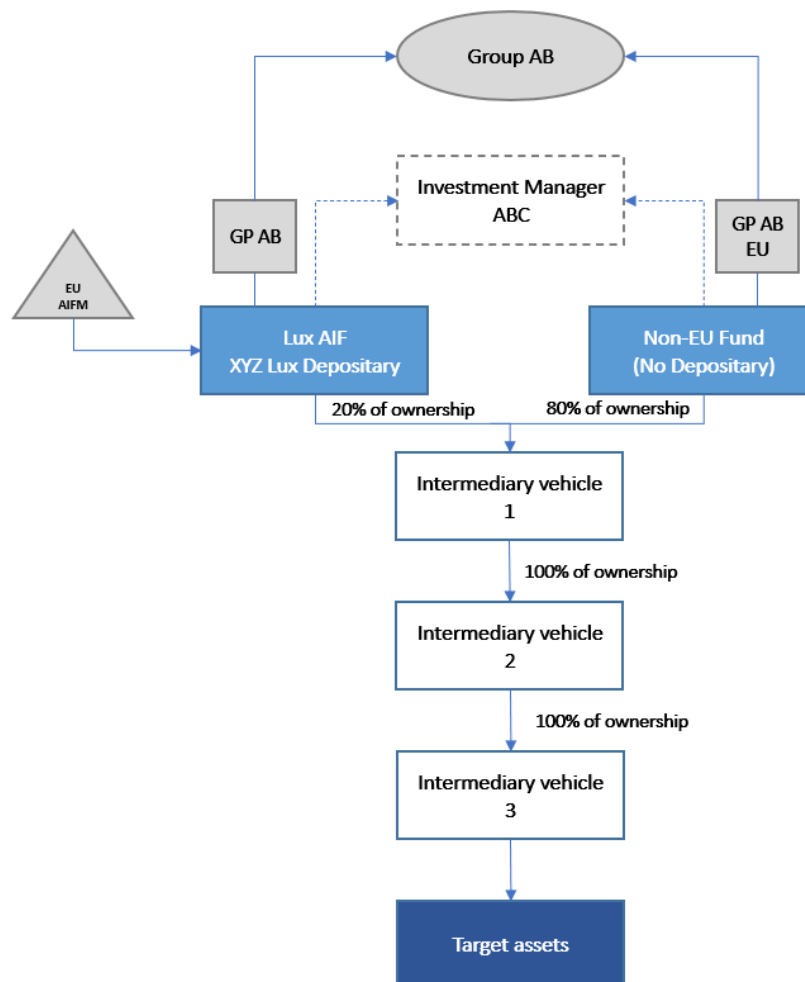
SUGGESTED APPROACH

- In principle, look-through is not applicable, and the controls should stop at the level of the Master Fund (based on articles 89(3) and 90(5) of the AIFMD-CDR) given the fact that the Feeder does not have any control over the Master.
- Safekeeping duties should stop at the level of the Master Fund.
- Based on the consideration that the Feeder invests at least 85% of its assets in the Master Fund (as per the definition of Master/Feeder structures included in the AIFMD), the depositary may, however, decide to apply the look-through requirements nevertheless in light of its risk-based approach.

¹² This model assumes that the full assessment of control was performed by the depositary to confirm that no direct or indirect control exists.

05

SCENARIO 5.a: Ownership < 50% (parallel Lux vehicle with a non-EU main fund)



FACTUAL CONSIDERATIONS

- The Lux AIF is a regulated Fund, set up as a parallel vehicle of a Non-EU Fund (the Main Fund).
- The Lux AIF has appointed XYZ Depositary.
- The Investment Manager ABC is in charge of both structures (main and parallel).
- As a result, there is a common investment management agreement / shareholder agreement between the Lux AIF, the Non-EU Fund and the Investment Management ABC.
- Both Funds are managed by two different GPs, which are ultimately part of the same Group.
- The Lux AIF has a minority ownership of 20% in the underlying Intermediary vehicle 1, while the Non-EU Fund has a majority stake of 80%.
- The investment strategy of the Lux AIF is to have an exposure to the Target Assets by investing alongside the Main Fund.
- The investment of the Lux AIF in the underlying Intermediary vehicle 1 is not the only asset of the Fund.

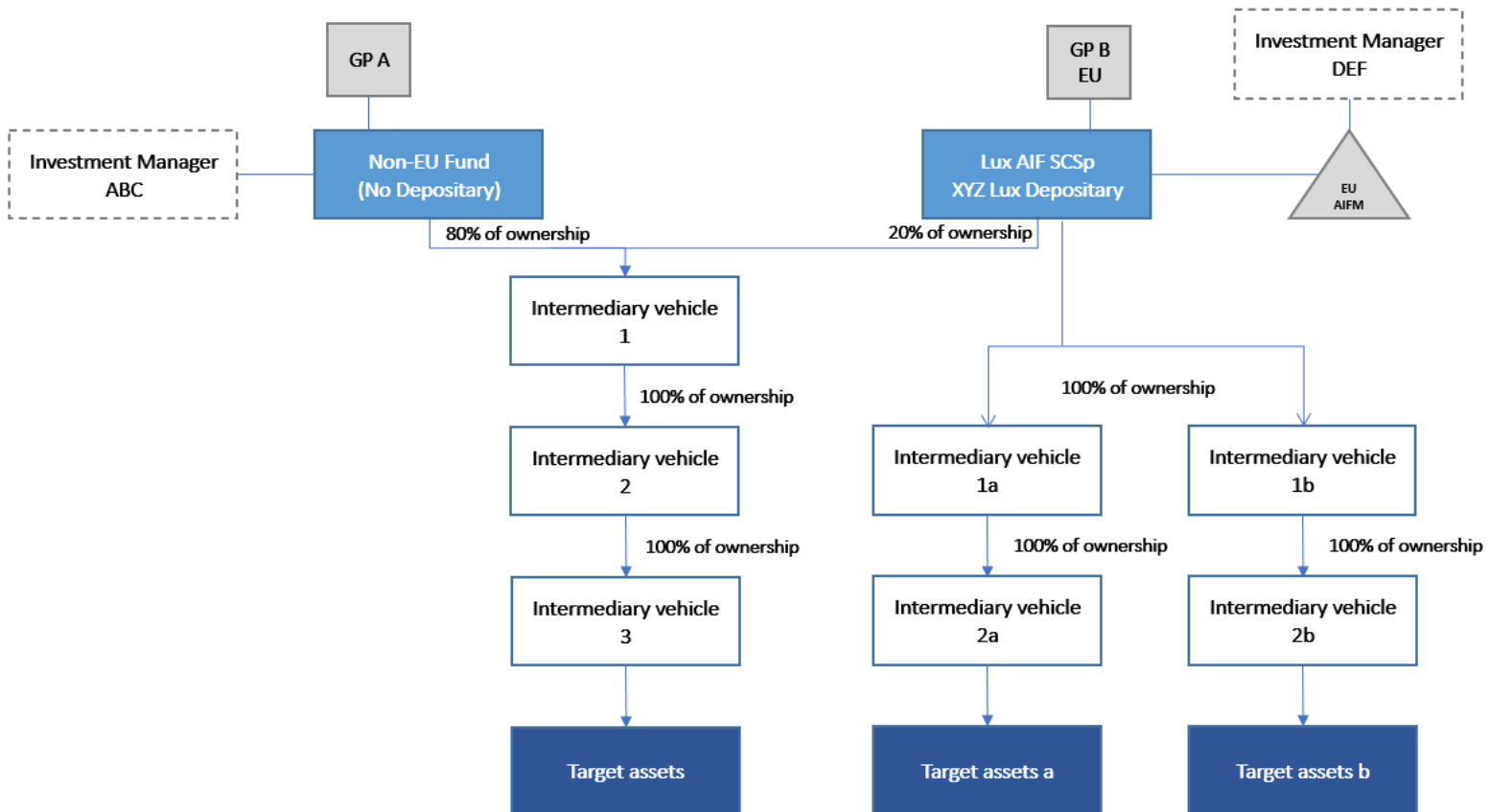
SUGGESTED APPROACH

- The Lux AIF having only 20% of ownership in the underlying Intermediary vehicle 1, there is no control through the voting rights.
- However, given that:
 - Both structures are ultimately part of the same Group,
 - The Lux AIF is setup as a parallel vehicle of the Non-EU Fund, and
 - There is a common Investment Manager, with a common investment management agreement / shareholder agreement,

We can conclude that control is established through the dominant influence criteria, and that look-through is applicable. Safekeeping obligations of the XYZ Depositary should apply until the Target Assets.

05

SCENARIO 5.b: Ownership < 50% (co-investment with a non-EU fund)



FACTUAL CONSIDERATIONS

- The Lux AIF is a regulated Fund with its own GP and AIFM, having appointed a XYZ Depositary.
- The EU AIFM has delegated the Portfolio Management to the Investment Manager DEF.
- The investment Strategy of the Lux AIF is to take directly or indirectly participations into private companies through equity, co-investment vehicles and other permitted instruments of any kind.
- The Lux AIF has 20% of ownership in an underlying Intermediary vehicle 1, owned 80% by a Non-EU Fund, having its own GP and Investment Manager ABC.
- There is no co-investment agreement between the Lux and the Non-EU structures.
- The investment of the Lux AIF in the underlying Intermediary vehicle 1 is not the only asset of the Fund.

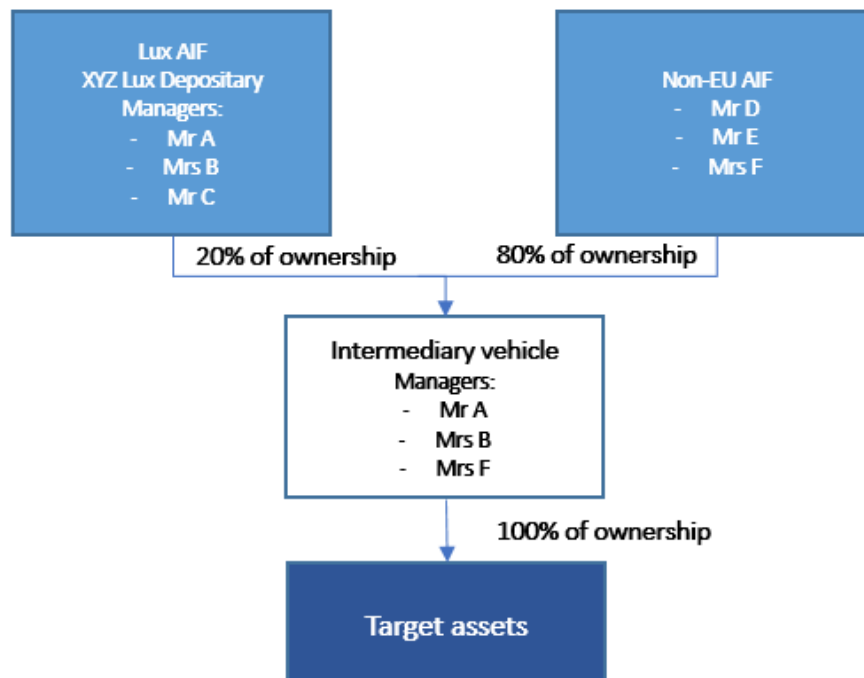
SUGGESTED APPROACH

- The Lux AIF having only 20% of ownership in the underlying Intermediary vehicle 1, there is no control through the voting rights.
- There is no link whatsoever between the Lux AIF (including its GP, AIFM and Investment Manager) and the Non-EU Fund (including its GP and Investment Manager).
- There is no control of any kind exercised by the Lux AIF/EU AIFM on the Intermediary vehicle 1.
- Look-through is not applicable, and safekeeping obligations of the XYZ Depositary should stop at the level of the Intermediary vehicle 1.
- Given the broader investment strategy of the Lux AIF, look-through also applies to Target assets a and Target assets b, as part of a wholly owned structure.

General note In relation to the investment of the Lux AIF into Intermediary vehicle 1, please note that if the investment policy doesn't clearly indicate minority holdings in co-investment vehicles/SPV (with the relevant risk disclosures) as target investments of the Lux AIF, look-through will have to be performed on the target assets of such Intermediary vehicle 1.

06

SCENARIO 6: Ownership < 50% with control



FACTUAL CONSIDERATIONS

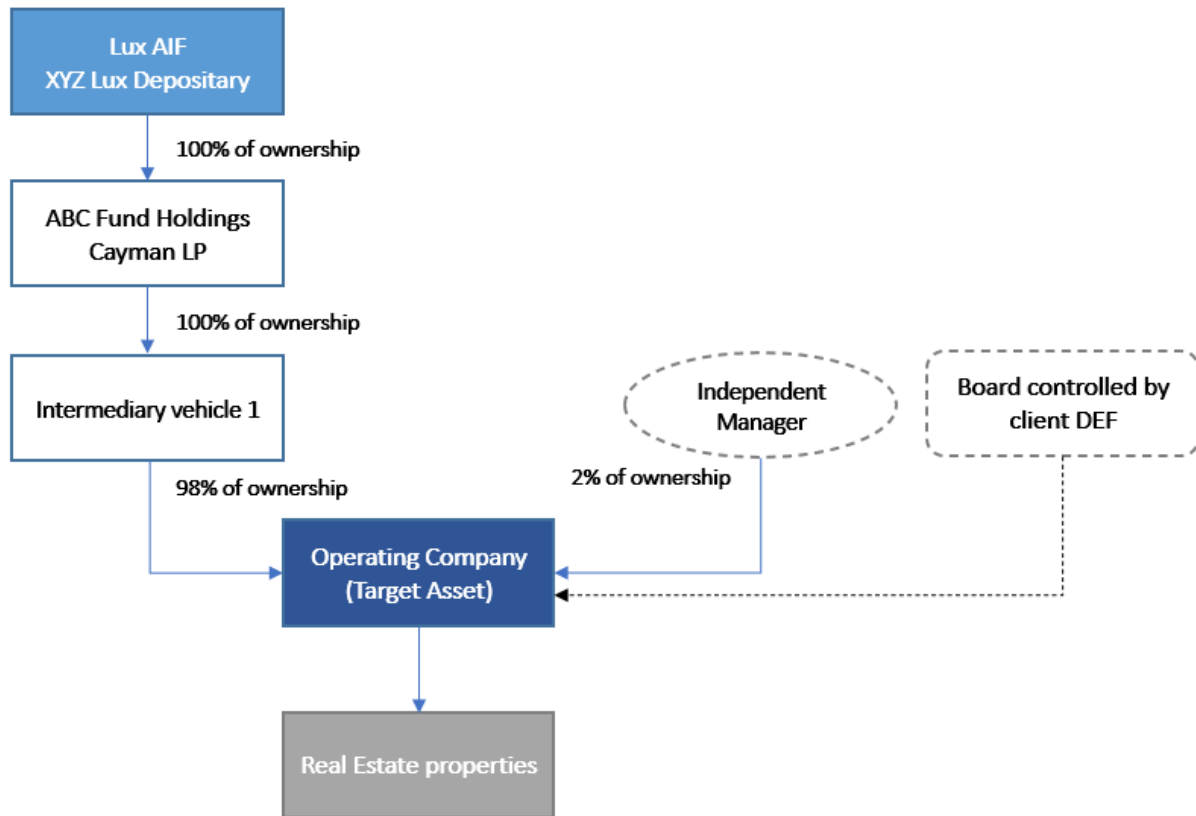
- Lux AIF owns 20% of ownership of the underlying Intermediary vehicle, while 80% is owned by a non-EU AIF.
- Target vehicle is wholly owned by the Intermediary vehicle.
- XYZ is the depositary of Lux AIF.
- 2 out of 3 Managers of Intermediary vehicle are Managers of Lux AIF, while the other one is a Manager of the Non-EU AIF.

SUGGESTED APPROACH

- Look-through is applicable. Despite the minority ownership of Lux AIF into the underlying Intermediary vehicle, dominant influence is exercised by Lux AIF given the 2 (out of 3) common Managers with the Intermediary vehicle.

07 —

SCENARIO 7.a: Ownership > 50% - level of look-through for investments through “Operating Company”



FACTUAL CONSIDERATIONS:

- Lux AIF fully owns the entity “ABC Fund Holdings Cayman L.P.”.
- Cayman LP and Lux AIF have a different GP.
- Cayman LP and Lux AIF belong to the same ‘group’: ABC Group.
- “ABC Fund Holdings Cayman LP” has been established for the purpose of the investment and holds 100% of Intermediary vehicle 1.
- Intermediary vehicle 1 is the 98% owner of the Operating Company.
- Exit strategy for the investments is to exit the Operating Company instead of selling the underlying assets individually.
- The investment objective described in the Private Placement Memorandum mentions that the fund may invest in portfolio companies and/or Operating Companies.
- The Investment Committee Memorandum also refers to the acquisition of the “Operating Company” as the Target Asset.
- The Operating Company shall, for each Financial Year, prepare consolidated annual audited accounts. The business of the Operating Company shall be the acquisition (directly or indirectly), development and management of assets in order to generate income and capital appreciation (the “Business”).

SUGGESTED APPROACH BY DEPOSITARY

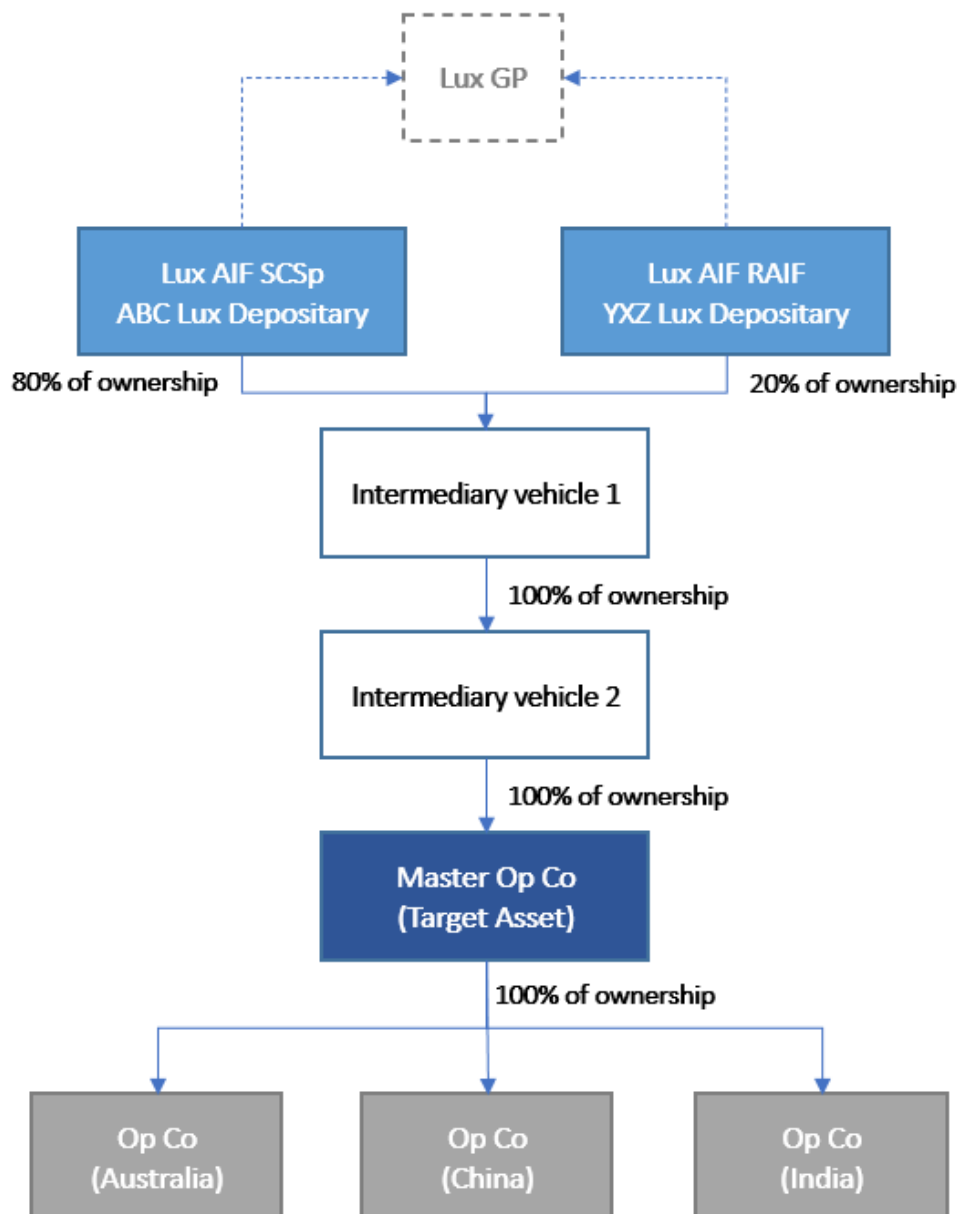
- Consider the passive role of the AIFM into the investment decision process.
- Consider the investment strategy of the AIF, i.e. the acquisition of portfolio companies and the reference to the acquisition of an Operating Company in the investment committee memo.
- Consider the Exit strategy.
- Consider the audited consolidated accounts at the level of the Operating Company.

The depositary suggests stopping the look-through at the level of the Operating Company.

General Note If the investment policy doesn't clearly indicate operating companies as target investments of the Lux AIF, look-through will have to be performed on the Real Estate properties.

07

SCENARIO 7.b: Ownership > 50% - level of look-through up to the main Op Co preparing consolidated audited accounts



FACTUAL CONSIDERATIONS

- Two parallel Lux AIFs have the same Lux GP and two different Lux depositaries.
- Lux SCSp AIF owns 80% of the Intermediary vehicle 1, and the Lux SCA RAIF owns 20% of the Intermediary vehicle 1.
- The Master Op Co owns 100% of the underlying Op Cos located worldwide (Op Co Australia, Op Co China and Op Co India) and prepares the consolidated audited accounts for the structure.

- The underlying Op Cos (Op Co Australia, Op Co China and Op Co India) are the operating companies and have not been established for the purpose of holding the AIF investments as they have been established for commercial and trading purposes. Their financial situation and existence are being reflected in the consolidated audited accounts prepared by the Master Op Co.
- The investment objective described in the Private Placement Memorandum mentions that the investment purpose is holding of participations in Luxembourg and foreign companies.
- The Investment Committee Memorandum refers to the acquisition of the Master Op Co as the Target Asset.
- The Exit strategy of the Investment Manager would be to sell the Master Op Co, as opposed to disposing separately the underlying companies.
- There is no common management between the two AIFs and the Master Op Co.
- The Master Op Co is operating as a standalone company.

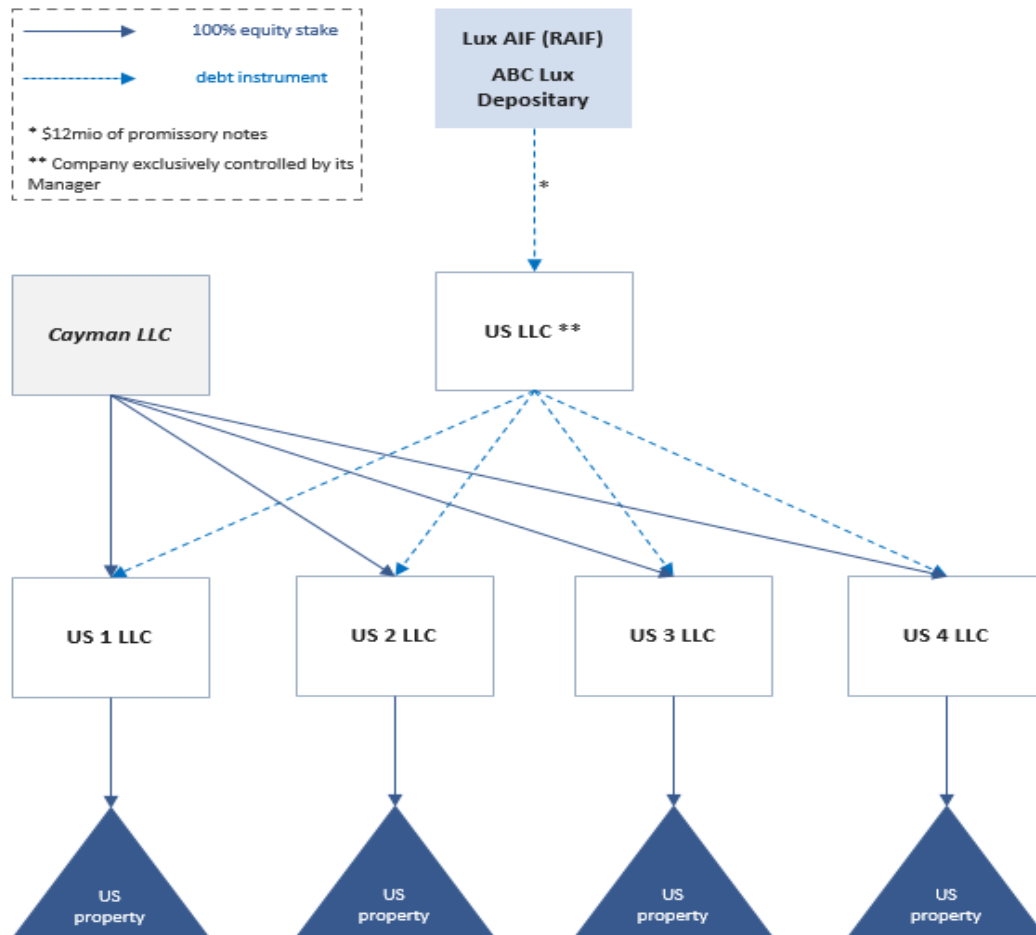
SUGGESTED APPROACH

- Look-through is applicable for the Lux SCSp, given the control exercised through the voting rights over the Intermediary vehicle 1.
- Look-through is applicable for the Lux RAIF, given the dominant influence exercised by the common GP.
- Look-through is applicable up to the Master Op Co.
- On a case-by-case basis, both depositaries may want to set up an information sharing agreement so that the Lux AIF RAIF can rely on the safekeeping work performed by the Lux AIF SCSp.

General note If the investment policy doesn't clearly indicate operating companies as target investments of the Lux AIF, look-through will have to be performed on the underlying investments of the Master Op Co.

08

SCENARIO 8: Exposure through debt instruments



FACTUAL CONSIDERATIONS

- The Lux AIF is a RAIF, having appointed an AIFM and a Lux Depository.
- The investment policy of the Lux AIF is to get indirect exposure to RE mainly through debt instruments.
- US LLC business object is to engage in any lawful act or activity for which limited liability companies may be formed and to engage in any and all activities necessary or incidental to the foregoing, including, but not limited to, owning real property.
- Debt instruments do not embed convertibility option.
- US LLC has no link with the Lux AIF, so does the Cayman LLC or any other entity of the investment structure.
- US LLC is exclusively controlled and managed by its Manager (dedicated section in the instruments of incorporation of the US LLC) and is financed primarily by promissory notes issued by the Lux AIF to pursue its activity.
- US LLC finances underlying US LLC 1, 2, 3 and 4 (construction companies) through debt, while equity is provided by the sole shareholder, the Cayman LLC.

- The investment into the US LLC is not the only investment of the Lux AIF.

SUGGESTED APPROACH

Inquire with the AIFM whether the investment policy is a credit fund only originating real estate loans or subscribing loan notes, in which case the borrowers/note issuers are to be considered as the target assets. Hence, no control test has to be implemented and no look-through applies going forward.

General note If the investment policy doesn't clearly indicate only debt instruments/loans as target investments of the Lux AIF, look-through will have to be performed on the underlying investments of US LLCs.

About the ABBL

The ABBL's mission is to promote the sustainable development of regulated, innovative and responsible banking. The ABBL is the largest and oldest professional association in the financial sector. It represents the banking sector in the broadest sense, i.e. the majority of banks established in Luxembourg, as well as regulated financial intermediaries and others in the sector including law firms, consultancies, auditors, market infrastructures, electronic money and payment institutions.

The ABBL provides its members with the information, resources and services they need to operate in a dynamic financial market and an increasingly complex regulatory environment. It is an open platform for discussing key industry issues and defining common positions across the sector. www.abbl.lu



About the LPEA

The Luxembourg Private Equity and Venture Capital Association ("LPEA") aims at promoting and defending the interests of investors and professionals principally active in the field of Private Equity ("PE") and Venture Capital ("VC"). The Association is the trusted and relevant representative body of PE and VC practitioners with a presence in Luxembourg.

Created in 2010 by a leading group of PE and VC players, with more than 590 members, LPEA plays a leading role locally, actively promoting PE and VC in Luxembourg.

LPEA provides a dynamic and interactive platform, which helps investors and advisors to navigate the latest trends in the industry. International by nature, the association allows members to network, exchange experience, expand their knowledge and grow professionally by attending workshops and trainings held on a regular basis.



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